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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 409

THE BALTIMORE TRANSFER COMPANY, DAVIDSON TRANSFER AND STORAGE COMPANY, COCHRANE TRANSPORTATION COMPANY, BROOKS TRANSPORTATION CO., INC., EAST COAST FREIGHT LINES, INC., AND BRISTOW LINES, INCORPORATED,
Appellants,

VS.

INTERSTATE COMMERCE COMMISSION
AND
UNITED STATES OF AMERICA,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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I. INTRODUCTION

Pursuant to the provisions of Rule 7, Paragraph 3, of the revised rules of the Supreme Court of the United States, Appellants, The Baltimore Transfer Company, Davidson Transfer and Storage Company, Cochrane Transportation

Company, Brooks Transportation Co., Inc., East Coast Freight Lines, Inc., and Bristow Lines, Incorporated, oppose the joint motion to affirm of the United States of America and the Interstate Commerce Commission.

II. STATEMENT

By joint application filed with the Interstate Commerce Commission, Quinn Freight Lines, Inc., Brockton, Mass. (Quinn), sought approval by the Commission under Section 5 of the Interstate Commerce Act of its purchase of the operating rights and property of Thomas F. Neale (Agnes B. Neale, Administratrix) (Neale) and the operating rights of Jesse B. Wadkins (Wadkins). By these two acquisitions, Quinn sought to extend its existing operating authority between Boston, Mass. and Baltimore, Md. to Washington, D. C. and Richmond, Va. The Neale authority sought to be acquired permits operations between Baltimore, Md. and Washington, D. C. and also between Baltimore, Md. and Reedsville, Va. and certain Va. counties, while the Wadkins' authority sought to be acquired permits operations between Washington, D. C. and Richmond Va. A combination of the two authorities sought to be acquired with Quinn's present authority would extend the lines of Quinn from Baltimore, Md. southward to Richmond, Va.

Quinn's main objective in the transaction submitted to the Commission for approval was to extend its operations from Baltimore, Md. to Washington, D. C. and Richmond, Va. (Sheet 7, Commission's Report and Order dated April 25, 1952, Plaintiffs' Exhibit 1). Neale's Baltimore-Washington rights link the Wadkins' Washington-Richmond rights with Quinn's present authority (Sheet 17, Plaintiffs' Exhibit 1). Further, if the transfer of the Neale certificate is approved, Quinn will also institute operations under this

certificate between Baltimore, Md. and Washington, D. C. (p. 339, Transcript of Testimony before the Commission).

Appellants are common carriers by motor vehicle authorized to transport and transporting general commodities in direct line service between New York, N. Y., Philadelphia, Pa., Baltimore, Md., Washington, D. C. and Richmond, Va., and points intermediate thereto, and by interchange arrangement transporting general commodities between these latter points and points north of New York, N. Y. served by Quinn. The approval of the proposed transaction would permit Quinn to institute single-line service, for the first time, in direct competition with Appellants, between Washington, D. C. and Richmond, Va., and points intermediate thereto, on the one hand, and on the other, Baltimore, Md. and Boston, Mass. and all intermediate points. The acquisition would also permit Quinn, for the first time, to institute a service, which had never heretofore been conducted by Neale, between Baltimore, Md. and Washington, D. C.

Having a direct interest in the proceedings before the Commission, Appellants appeared therein in opposition to the approval of the proposed transactions. At the very outset of these proceedings, Appellants realized that what Quinn was attempting to do was to link two additional operating authorities to its existing operating authority to permit through transportation south to Richmond, Va. The two links in this resulting authority would be the Neale rights between Baltimore, Md., and Washington, D. C. and the Wadkins' rights between Washington, D. C. and Richmond, Va. If the Commission refused to approve the transfer of the Neale Baltimore-Washington link, the entire transaction would fall (Sheet 19, Plaintiffs' Exhibit 1).

A hearing was held in these proceedings and an Examiner of the Commission issued his proposed Report approving the entire transaction. Appellants filed exceptions to this proposed Report pointing out that the Baltimore-Washington link (the Neale authority) had, as a matter of record, *never* been operated. Appellants requested the Commission to make a finding that these rights had never been operated and a conclusion that because public convenience and necessity warranting the reinstitution of this dormant service had not been proven, approval of the transaction should be denied. No findings or conclusions on this issue were made by the Examiner and on April 25, 1952, the Commission adopted the proposed Report of the Examiner, without change, and approved the transaction.

Appellants then filed a Petition for Reconsideration of this April 25, 1952 Order of the Commission, again alleging the absolute dormancy of the Baltimore-Washington link and requesting findings and conclusions on this issue. The Commission denied this Petition in its entirety on July 21, 1952 and failed to make the findings and conclusions requested.

Appellants thereafter instituted in the United States District Court for the District of Maryland, an action seeking to set aside the Order of the Commission dated April 25, 1952 on the basis that the Commission had failed to make any findings or conclusions with respect to the above material issue raised on the record. The District Court determined that findings had been made on this issue, citing statements in the Commission's Report and Order that: (1) Operations were conducted by Neale between Baltimore and Washington through an inter-change arrangement with Quinn and, (2) that operations have at all times

been conducted under Neale's certificate without regard to the interchange arrangement (pp. 13, 14, District Court's Opinion). Factually, in its Report and Order of April 25, 1952, the Commission concluded that this same alleged interchange arrangement referred to by the Court was not a genuine interchange, that it was not consonant with the Commission's Rules, that such arrangement had been instituted after the Agreement to purchase (Sheets 15 and 16, Plaintiffs' Exhibit 1), and did not consider operations under the interchange arrangement as operations of Neale. The second Commission statement referred to above, relied on by the District Court as a finding that Neale had actually conducted operations between Baltimore and Washington, is in the face of the *only* evidence of record that Neale, in fact, had never claimed to have conducted any such operations except under the abortive interchange arrangement with Quinn.

The *only* evidence in the record relating to the question of whether Neale had or had not conducted operations between Baltimore, Md. and Washington, D. C. appears in the form of a stipulation between Counsel for Appellants and Counsel for Quinn at page 152 of the Transcript of Testimony of the hearing before the Commission.[1]

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[1] Mr. Money (Attorney for Protestants): "I think there ought to be something stated about that. Also, in addition on these two exhibits that all the shipments transported under it, prior to the arrangement they had with Quinn, moved between these five Virginia counties, on the one hand, and on the other, Washington or Baltimore and that none of the shipments prior to the arrangement with Quinn moved between Washington and Baltimore, in either direction."

Mrs. Kelly (Attorney for Applicants at page 153): "As stated by Mr. Money, we have agreed that Mrs. Moss (Administratrix of the estate of Thomas Fereol Neale) would have testified the operations with Quinn have been *the only operations between Washington and Baltimore*, but she has also interchanged traffic with Quinn that originated at or was destined to points in Lancaster County." (Emphasis supplied.)

The District Court, in resolving the issues before it, adopted the following standard of judicial review of Orders of administrative agencies (pages 10, 11, 12 of the District Court's Opinion):

> *The questions presented involve the application of the Rule of Administrative Finality, which Rule is defined to be that if the Commission's Order is based upon adequate findings, which in turn are supported by substantial evidence, it cannot be disturbed by a Court on review even though the Court might consider the Commission's action wrong and against the weight of the evidence and that this Rule has not been altered by the Administrative Procedure Act, citing Interstate Commerce Commission v. Union Pacific RR. Co., 227 U. S. 541 and Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474.*

Applying this principle to the issues before it, the District Court determined that the Commission's Order of April 25, 1952 was valid and dismissed Appellant's complaint.

III. QUESTIONS PRESENTED

1. Whether the District Court in initially holding that the Administrative Procedure Act has not altered the Rule of Administrative Finality erred in so holding, particularly in that it failed to consider the effect of Section 8 (b) and 10 (e) of that Act upon the Administrative Agency, the Court, or the Rule.

2. Whether the District Court erred in its interpretation and application of the Rule of Administrative Finality, particularly in that it failed to determine the nature and existence of the basic, essential, material, and "Quasi Jurisdic-

tional" Facts, Issues, Findings, and Questions Essential to the Validity of Administrative Orders.

These questions and the issues raised by them are closely related and for that reason will be considered together.

IV. ARGUMENT

The District Court applied an incorrect standard of judicial review in determining whether the order of the Interstate Commerce Commission complained of was based upon adequate findings, which in turn were supported by substantial evidence.

Appellants contend that in this case, the District Court adopted an entirely incorrect standard of judicial review in resolving the questions presented to it, and as a result of adopting this incorrect standard, erroneously concluded that the Commission order complained of is valid.

A careful analysis of the Court's statement of its concept of the Rule of Administrative Finality, which was the standard by which all issues in the proceeding before it were judged, reveals that the District Court completely misapprehended the proper standard of judicial review to be applied in cases of this character. The District Court has further compounded its error by holding that the Administrative Procedure Act has not altered this incorrect standard. Appellants are at a loss to understand the District Court's citation of this Court's Opinion in *Universal Camera Corp. v. N. L. R. B.*, supra, as substantiation of the correctness of this standard of judicial review. Appellants submit that this is precisely the standard which this Court rejected in that case.

In the *Universal Camera* case, this Court was called upon to determine the effect of the Administrative Procedure

Act and the Taft-Hartley Act upon the standards to be applied by Courts in reviewing decisions of the National Labor Relations Board. This Court, in reaching its determination of the issues in this case, stated:

> "It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts if for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act."

This Court then referred to the existing standards of judicial review of administrative orders which had been adopted by various Courts and concluded that, in some instances, these standards were consistent with the intent of Congress as expressed in the Administrative Procedure Act and, in other instances, were not. Appellants contend that the standard adopted by the District Court in this case is squarely within that category of standards of judicial review rejected by Congress and by this Court. A comparison of the language used by the District Court in its definition of the Rule of Administrative Finality with the standard of judicial review which this Court rejected in the *Universal Camera* case reveals a startling similarity.

In essence, the District Court's Rule of Administrative Finality is that it was precluded from disturbing the Commission's Order even if the order was wrong and against the weight of the evidence, the Administrative Procedure

Act notwithstanding. In the *Universal Camera* case, this Court referred to its previous decision in *N. L. R. B. v. Nevada Consol. Copper Corp.*, 316 U. S. 105 and rejected the standard of judicial review set forth in that case which was that Courts are precluded from weighing evidence in reviewing orders of the National Labor Relations Board and they cannot set them aside even though different conclusions might have been reached.

This Court in the *Universal Camera* case concluded that as a result of the passage of the Administrative Procedure Act and the Taft-Hartley Act, the following standard of judicial review is applicable to Courts considering the correctness of administrative orders:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed upon the responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirements that evidence appears substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect; but they must, nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In the case of *Chicago and Eastern Illinois RR. Co. v. U. S. et al.*, August 27, 1952, 107 F. Supp. 118; affirmed per

curiam 344 U. S. 917, the Statutory Three Judge Court demonstrated the proper concept to be applied by Courts in reviewing the correctness of orders of administrative agencies. In that case, the Court initially considered whether the requisite findings of fact necessary to support a Commission Order had been made and in this consideration gave full scope to Section 8 (b) of the Administrative Procedure Act. The Court held that the Commission is not relieved of its duty to make the basic or "quasi jurisdictional" findings essential to the validity of the order and stated that something more than an ultimate finding is necessary. Having found that the basic and essential findings essential to the validity of the Commission's Order were present, the Court then weighed the substantiality of the evidence supporting these findings. In reaching its conclusion that the Order of the Commission complained of should be upheld, the Court made the following pertinent statement which revealed a complete understanding of the proper principle to be applied in reviewing the correctness of Commission orders:

> "In view of the entire record, we cannot say that the Commission's finding is contrary to the weight of the evidence or without support of that 'quality of proof which induces conviction and makes an impression on reason', *N. L. R. B. v. Thompson Products*, 6 Cir., 97 F. (2d) 13, 15. We hold that this finding is supported by substantial evidence."

Appellants contend that if the District Court in the instant case had applied the same standard of judicial review and given full credence to the provisions of the Administrative Procedure Act it would have been required to reach a different conclusion.

There cannot be the slightest question that the Interstate Commerce Commission is subject to the provisions of the Administrative Procedure Act. *Riss and Co. v. U. S.*, 341 U. S. 907; *Universal Camera Corp. v. N. L. R. B.*, supra. Contrary to these decisions, the District Court has held that the Commission is not required to comply with the provisions of this Act and it follows that the District Court is in obvious error in this regard.

Adequacy of the Commission's Findings

Appellants, throughout the proceedings before the Commission and in the District Court, constantly and vigorously complained that the Commission had failed to make findings and conclusions on the material question of the complete dormancy of the Neale Baltimore-Washington link in the proposed transaction. In accordance with the rights granted them by the provisions of the Administrative Procedure Act (Section 8 (b)) Appellants filed Exceptions and subsequent thereto a Petition for Reconsideration requesting findings and conclusions on this material issue raised by them on the record. In this state of the record, Appellants contend that the Commission was required to make a finding on this dormancy issue, (1) because it was raised as an exception by these parties at the appropriate time in a proceeding before it and disposition of the question was required by the specific terms of the Administrative Procedure Act; (2) that the issue raised by Appellants was a material issue of fact, law or discretion presented on the record upon which findings and conclusions, as well as the reasons or basis therefor, were required to be made by the provisions of this Act and (3) that a finding on the question of dormancy is a basic and essential finding necessary to the validity of orders issued under Section 5 of the

Interstate Commerce Act when this question is raised in a proceeding before the Commission. The Commission failed to make any findings and conclusions on this issue.

The initial error of the District Court was its determination that findings adequate to support the validity of the Order of April 25, 1952 had been made by the Commission. This initial error flows directly from the Court's misapprehension of the correct standard of judicial review which has been referred to heretofore. The principal issue presented to the District Court by Appellants was whether or not the Commission had failed to make findings and conclusions on this dormancy question, which findings and conclusions were essential to the validity of the Order complained of. The Court, applying this incorrect standard, erroneously determined that findings on this issue had been made, basing its conclusion on statements contained in the Commission's Report that operations were conducted between Baltimore and Washington through an alleged interchange arrangement with Quinn and that operations have at all times been conducted under Neale's certificate without regard to this interchange arrangement. A review of the *entire* record in this proceeding conclusively proves that operations under this interchange arrangement could not and did not constitute operations by Neale for the reason that the arrangement was not genuine, was not consonant with the Commission's Rules, was instituted after the agreement to purchase and operations thereunder were held not to be operations by Neale in the Commission's Report. The statement that operations have at all times been conducted under Neale's certificate, without regard to this interchange arrangement, does not and cannot refer to operations between Baltimore, Md. and Washington, D. C. for the reason that such a conclusion is completely negated by the *only* evidence of record.

It is, therefore, apparent that the District Court did not review the record as a whole, including the evidence opposed to the validity of the Commission's action as required by the provisions of the Administrative Procedure Act, to determine the validity of the Commission's Order of April 25, 1952 and its failure to do so resulted in its erroneous conclusion that this Order was valid.

Further substantiation of the District Court's error in this regard is contained in its statement that the only basic finding required to be made by the Commission was consistency with the public interest, citing *Alabama G. S. R. v. U. S.*, 340 U. S. 216. "Consistency with the public interest" is the ultimate conclusion to be determined by the Commission in a proceeding under Section 5 of the Interstate Commerce Act, not a "basic finding" required to support this ultimate conclusion. For reasons heretofore stated, the District Court's conclusion that the only basic finding required to be made by the Commission was whether or not the proposal was consistent with the public interest is clearly in error and the error flows directly from the Court's misconception of the proper standard of judicial review. Appellants contend that the Commission was *required* to make findings and conclusions on the dormancy issue and having failed to do so, its Order of April 25, 1952 is invalid.

In spite of the Court's conclusions to the contrary, the Commission is subject to the provisions of the Administrative Procedure Act and was required to make the findings and conclusions requested by Appellants in the proceeding before it. If any doubt exists on this question, it is effectively dispelled by the statement of Representative Walter

of Pennsylvania when he outlined the purposes of Section 8(b) of the Administrative Procedure Act on the floor of the House of Representatives of the Congress on May 24, 1946:[2]

> "The second subsection of section 8 is a statutory statement of the right of the parties to submit for the full consideration of the presiding officers, first, proposed findings and conclusions, or second, exceptions to recommend decisions or other decisions being appealed or reviewed administratively and, third, supporting reasons for such findings, conclusions, or exceptions. The record must show the official rulings of the agency upon each such finding, conclusion, or exception presented. These provisions assure all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision of any case. So that the parties and the reviewing courts may be fully apprised, all recommended or other decisions must include first, findings and conclusions, as well as the reasons or basis therefor, upon all the issues of fact, law, or discretion presented by the record and, second, the appropriate agency action or denial.
>
> The purpose and effect of these provisions are clear upon the face of the section. One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and the subjects of the findings and conclusions will be determined by the record and by the legal, factual, or discretionary issues raised by the parties. The mere parroting of findings or conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow

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[2] Legislative History Administrative Procedure Act, Senate Document No. 248, 79th Congress, Second Session, p. 367.

indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined."

The duties imposed upon a reviewing Court by Section 10(e) of the Act were stated by Senator McCarran[3] in the following language:

"* * * The enforcement of the bill by the independent judicial interpretation and application of its terms is a function in which the final analysis is clearly conferred upon the Courts.

Therefore, it will be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used in so far as they have not been defined in the bill itself."

Substantiality of Evidence

The issues raised by Appellants before the District Court did not initially present a question involving the "substantiality of evidence" phase of the Rule of Administrative Finality, which phase was of concern to this Court in the *Universal Camera* Case. There is no reason to believe, however, that this latter decision does not apply with equal force to the "adequate findings" phase of this Rule. The initial question, as heretofore stated, was whether or not the Commission had made the basic, essential or "quasi jurisdictional" findings necessary to support its Order. Even if adequate findings can be considered to exist, which Appel-

[3] P. 2159, Congressional Record, Volume 92, Part 2, 79th Congress, Second Session.

lants deny, the District Court erred in applying the incorrect standard of judicial review in considering the substantiality of the evidence presented to the Commission.

In weighing the substantiality of evidence supporting the Commission's findings, the District Court was required to review and consider the entire record, including the evidence opposed to the Commission's action, and if the evidence demonstrated that the Commission was wrong or that its Order was against the weight of the evidence, it was required to hold the Order invalid. *Universal Camera Corp. v. N. L. R. B.*, Supra. In this case, the District Court has completely ignored the only evidence of record on the question of the dormancy of the Neale rights between Baltimore, Md., and Washington, D. C., namely, the stipulation by counsel that Neale had never claimed to have conducted any such operations except under the abortive interchange arrangement with Quinn. The District Court has, moreover, failed to give consideration to the evidence of record and findings of the Commission relating to this interchange arrangement which resulted in the Commission's conclusion that operations thereunder were not those of Neale. Further the Court failed to consider the absolute lack of evidence necessary to support a finding that a public need warranted the reinstitution of the dormant Neale operation and failed also to give proper consideration to the overwhelming evidence and the findings adopted by the Commission that protesting carriers are performing a completely satisfactory transportation service.

The District Court has clearly misconceived its duty as a reviewing court and its judgment must be held to be erroneous.

Materiality of Dormancy Issue

If the District Court had not misconceived its duty as a Court reviewing the validity of a Commission Order and had the Commission consequently been required to comply with the provisions of the Administrative Procedure Act with respect to the issue of the dormancy of the Neale rights, an Order denying approval of the proposed transaction would have been necessitated.

The question of dormancy has been raised in many proceedings before the Commission and as a result definite principles of law have emerged governing the transfer of dormant certificates. Since 1948, the Commission has consistently held that where a proposal to transfer a dormant motor carrier certificate or a certificate under which the purchaser proposed to perform a service different from that performed by the seller, a showing of public convenience and necessity warranting the new operation must be made to substantiate a conclusion of consistency with the public interest. In developing this principle of law, the Commission has adopted an unvarying requirement that a finding of public convenience and necessity warranting the new service is an essential finding which must be made before such certificates can be transferred under Section 5. This principle has been approved by the District Courts and by per curiam decisions of this Court. *Herrin Transportation Co. v. U. S. et al.* (1952) 108 F. Supp. 180; affirmed per curiam 73 S. Ct. 479 (1953); *Shein et al. v. U. S. et al.* (1951) 102 F. Supp. 320; affirmed per curiam 343 U. S. 944.

Since the Commission decision in the Herrin case in September, 1951, approved subsequently by a District Court and per curiam by this Court, the Commission has extended this principle to the proposed transfer of a cer-

tificate under which operations had been only partially conducted, holding that as a condition precedent to the transfer of such a certificate, the dormant portion thereof was required to be submitted for cancellation. *Louis Kletter — Control — Eastern Freight Ways, Inc. — Purchase — Cole*, May 6, 1953, MC-F-4518.

In *Adkins et al. — Purchase — Star Transit, Inc.*, 38 MCC 240, the Commission stated:

> "Certainly where nonoperation resulting from abandonment has continued over a substantial length of time it is apparent that questions of public convenience and necessity are involved in any resumption of service over the routes and between the points concerned; and these questions of convenience and necessity are not affected by the continuance in existence of unused operating rights. *Turner v. State*, 76 Pac. (2d) 254. Where the period of nonoperation is less, the questions of public convenience and necessity involved in any proposed resumption may be of less significance, but they are nevertheless present."

In *Smith and Solomon Trucking Co. — Purchase (Portion) — Reisch Trucking and Transportation Co., Inc.;* MC-F-4588; June 11, 1951, the Commission stated:

> "It is obvious from the foregoing conclusions in the P. I. E. case that the dormancy of the considered rights is of serious concern to us and intervenors and that we may, indeed, it is our duty to, weigh the effect of the proposed resumption of operations on intervenors ability to continue providing the public with adequate service and to maintain their financial stability. In weighing such effect, we may, and certainly should, consider, if our conclusions are to have any substance, whether there is a public need for the institution of what would constitute a new service."

In *Motor Cargo, Inc. — Purchase — Ray Williams Freight Lines, Inc.*, 58 MCC 87:

> "* * * existing carriers are not required to show that the territory, from the standpoint of competition, has reached the saturation point, and that the additional competition which would follow approval of the transaction would be the particular competition which would convert their previously profitable operations to unprofitable operations. We have held in numerous cases that where evidence does not establish a public need for the revitalization of operations under rights which little or no operations have been conducted, existing carriers which have expended funds and energy in developing facilities to handle available traffic and are handling the traffic satisfactorily, are entitled to protection against the establishment of what would amount to a new and vigorous service in competition with them, and that such protection should be afforded not only for the protection of the carriers themselves, but to promote stability and sound economic conditions in the industry and the rendition of adequate transportation to the public. From the standpoint of consistency with the public interest, we see little difference, as a practical matter, between the transaction here proposed and those disapproved in *Central N. Y. Freightways, Inc. — Purchase — Gorea's M. Exp., Inc.*, 55 MCC 390 and *LaMere and Conroy — Purchase — Ziffrin Truck Lines, Inc.*, 55 MCC 501."

In *Pacific Intermountain Express Co. — Purchase — Browning Freight Lines, Inc.*, MC-F-4917, October 13, 1952:

> "The evidence demonstrates that the proposed unified service would be convenient and advantageous to the supporting consignors and consignees, but fails to show an actual need therefor, the standard of proof required when the selling carrier's operations have been limited, sporadic, inactive, or dormant. *LaMere*

and Conroy — Purchase — Ziffrin Truck Lines, Inc., 55 MCC 501. Approval of the transaction would result in the entry into the considered territory of a strong competitor whose service would be essentially different from that normally performed by vendor."

Appellants contend that the term, "public need" as used in the above decisions is synonymous with the clause, "public convenience and necessity". One of the elements necessary to establish public convenience and necessity is the showing that existing carriers are not performing an adequate service. In *Hudson Transit Lines v. U. S.*, 82 Fed. Supp. 152, affirmed per curiam, 338 U. S. 802, the United States District Court for the Southern District of New York, set aside a portion of a Commission order granting a certificate of public convenience and necessity for the reason that the Commission's conclusions were not supported by adequate findings and substantial evidence. In remanding the case to the Commission, the Court made the following statement with respect to public need:

> "The Commission has frequently held that under s. 207 of the Act, 49 U. S. C. A. s. 307, there must be an affirmative showing not only that a common carrier service is required in the convenience of the public, but also that it is a necessity, and that the latter element includes a showing that present facilities are inadequate. *Pan-American Bus Lines*, Operation, 1 MCC 190, 203; *Bluenose Bus Co., Ltd., Common Carrier Application*, 1 MCC 173, 176; *Richard L. Richards, Extension*, 6 MCC 80, 81; *Ohio Transportation Co., Common Carrier Application*, 43 MCC 247, 259. The courts, too, have recognized inadequacy of existing facilities as a basic ingredient in the determination of public 'necessity.' *Inland Motor Freight v. United States*, 60 F. Supp. 520, 524 (E. D. Wash.). See also, *I. C. C. v. Parker*, 326 U. S. 60, 69-70 and dissenting opinion of

> Mr. Justice Douglas at p. 74. This does not mean that the holder of a certificate is entitled to immunity from competition under any and all circumstances. *C. & O. Ry. Co. v. United States,* 283 U. S. 35. The introduction of a competitive service may be in the public interest where it will secure the benefits of an improved service without being unduly prejudicial to the existing service. *I. C. C. v. Parker,* supra. No such finding has been made nor is there any evidence to support such a finding."

In the instant case, there was an affirmative showing by Appellants that their facilities were adequate and satisfactory and the Commission made a finding to this effect. This finding, of itself, was sufficient to warrant a denial of the proposed transaction if the Commission had not initially erred in refusing to make findings and conclusions on the material issue of the dormancy of the Neale Baltimore-Washington operation.

Although the Commission was presented with an application covering the transfer of two separate operating authorities, it treated the entire matter as a single transaction. It found that what Quinn was proposing to purchase, as an entity, was sufficient operating authority to enable it to extend its operations to Richmond, Va. and the entire transaction was conditioned upon the approval of the vital Baltimore-Washington link. Although the Neale certificate permits operations between other points, the only portion of this certificate which was at all pertinent to the transfer proceeding in the eyes of both Quinn and the Commission, was the authority granted to Neale to conduct operations between Baltimore and Washington. Without this link, the entire transaction would fall.

The materiality of the issue, Appellants contend, has been amply demonstrated and the Commission, being bound by the requirements of Section 8 (b) of the Administrative Procedure Act, was required to make findings and conclusions on this issue. The only possible explanation of the failure of the Commission to make these findings and conclusions is that it considered the issue immaterial.[4] Appellants contend that it is a complete distortion of the clear intent of the Administrative Procedure Act to hold that the Commission, by the simple expedient of concluding that an issue raised on the record is immaterial, may ignore the provisions of this Act and refuse to make findings and conclusions on this issue. Such a holding would completely defeat the Congressional intent inherent in this Act in that it would leave to the Commission's sole discretion the determination of whether or not the Act is applicable on any given issue.

The District Court evidently was in agreement with Appellants' contention in this regard because it determined that the Commission had made findings and conclusions on this dormancy issue. However, as heretofore demonstrated, the statements relied on by the District Court, in this regard, were not intended to be and cannot, under any possible interpretation, be construed as findings or conclusions on this issue.

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[4] By Order of the full Commission dated July 21, 1952, (Plaintiffs' Exhibit 5), the following disposition was made of Appellants' Petition for Reconsideration: "And it further appearing, that the material matter set forth in Protestant's Petition have been considered by Division 4 and discussed in the said Report, that no material fact or argument that warrants reconsideration has been presented, *it is further ordered*, that the Petition be, and it is hereby denied.

Errors in the Motion to Affirm

A reading of the Motion to Affirm filed on behalf of the Commission and the United States reveals that this Motion so closely follows the District Court's Opinion that it is subject to the same allegations of error that Appellants have made with respect to the Court's Opinion. Consequently, it is unnecessary to specify in detail the errors contained in this Motion or to answer each separately.

It is important to note, however, that Counsel for the Commission and the United States now rely upon operations conducted under the interchange arrangement with Quinn as constituting operations by Neale between Baltimore and Washington. The obvious error of this position and the present inconsistency of the Commission is emphasized by the fact that the Commission, itself, in the Report of April 25, 1952 stated that this interchange arrangement between Quinn and Neale was "not consonant" with the rules prescribed in *Lease and Interchange of Vehicles by Motor Carriers*, 52 MCC 675. This very Lease and Interchange proceeding referred to by the Commission was before this Court recently and received approval as to its validity. It is indeed startling to have the Commission claim, as it has in its Motion to Affirm, that an interchange arrangement not in accord with these same rules is, nevertheless, a valid interchange arrangement, constituting an operation by Neale.

Moreover, on page 2, footnote 2, of the Motion to Affirm, the following statement is made in support of the argument that a finding was made on the issue of the dormancy of the Neale rights between Baltimore and Washington: "As the District Court noted, the Commission expressly found that Neale had made a large number of interchange shipments

between Baltimore and Washington-Virginia in 1950 and 1951, and that, despite the interchange arrangement, *these operations* at all times had been "actively and consistently conducted under Neale's certificate." (Emphasis supplied.) This statement makes it appear that Neale had conducted operations between Baltimore and Washington irrespective of the interchange arrangement with Quinn, and is, therefore, a positive misstatement both of the finding of the Commission as stated by the District Court, and of fact, the fact being as heretofore shown, that the only operations Neale claimed to have conducted between Baltimore and Washington were under the abortive interchange arrangement with Quinn, and no others.

In essence, the Motion to Affirm demonstrates an attempt to avoid the issues raised by Appellants before the Commission, the District Court and through this Appeal, and should be so considered by this Court. Further, it demonstrates another attempt to gain judicial support for the Commission's refusal to abide by the provisions of the Administrative Procedure Act, and for judicial sanction of the Commission's apparent wish not to be governed by its prior decisions, which heretofore have been upheld by this Court at its request.

V. CONCLUSION

The issues in this proceeding are of vital importance to Appellants and to the motor carrier industry generally. Appellants have invested tremendous sums of money in equipment and other facilities to serve the shipping public in the area in which they are authorized to operate. The approval of the instant transaction will place in direct competition with them a new carrier who will be authorized to perform not only an overhead operation between Boston,

Mass. on the one hand, and Washington and Richmond and points intermediate thereto on the other, but will also permit this new carrier to perform, for the first time, direct competitive service between such points as New York, N. Y., Philadelphia, Pa., Wilmington, Del., and Baltimore, Md., on the one hand, and, on the other, Washington, D. C., Richmond, Va. and points intermediate thereto.

Appellants would not be before this Court had the Commission performed its duty, as required by law, or had it treated the Quinn application as it has treated all similar applications since 1948, or even had it given Appellants any reason for departing from its well settled principles, which principles it has now made more extensive of application, or, in the final analysis, had the District Court applied a proper standard of review in its determination of the validity of the Commission action herein complained of.

This decision of the District Court cannot be allowed to stand. It cannot be allowed to stand because it is judicial authority for the position taken by the Commission that it may ignore the requirements of Section 8 (b) of the Administrative Procedure Act. This decision cannot be allowed to stand because to permit the same would be to acquiesce in the application by this District Court of an incorrect standard of judicial review in determining the merits of any complaint brought before it from any government agency. Further, this decision of the District Court cannot be allowed to stand for the reason that it has brought about an embarrassing conflict among the several District Courts with respect to the proper standard of judicial review required, as has hereinabove shown. Finally, this decision of the District Court cannot be allowed

to stand because it permits grievous harm to Appellants in that it sanctions a Commission order which permits Quinn to invade an area satisfactorily served by existing carriers without subjecting it to the same standards of proof and principles of law which have been consistently applied to all other carriers,[5] including Appellants.

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[5] In *Boyce Motor Lines, Inc. — Purchase (Portion) — Vollmer Transportation, Inc.*, MC-F-5112, a transaction practically identical with the one proposed in the instant case was involved. The Examiner's proposed Report issued in this proceeding on October 15, 1953, well illustrates the legally correct manner in which transactions of this character should be judged by the Commission and its Examiners when proper scope is given to the Administrative Procedure Act. In this case, Boyce held operating authority between Buffalo and Niagara Falls, N. Y., and Philadelphia, Pa., serving Albany, N. Y., as an intermediate point. It proposed to purchase a portion of Vollmer's certificate permitting operations between Albany, N. Y., and New England points for the purpose of providing a single-line service between points in N. Y., in the Buffalo, Niagara Falls area, on the one hand, and New England points, on the other. (Quinn proposes to purchase the Neale and Wadkins' authorities for the purpose of providing single-line service between Massachusetts points, on the one hand, and Washington, D. C., and Richmond, Va., and points intermediate thereto, on the other.) Vollmer had conducted operations under its certificate between points in New York west of Albany and New England points but had never performed any service between Albany and New England points. (Neale had conducted operations between Baltimore, Md., and Reedsville, Va., and other Va. points but had never conducted any operations between Baltimore, Md., and Washington, D. C.) The portion of the Vollmer authority sought to be acquired connects with the Boyce authority at Albany. (The Neale authority connects with the Quinn authority at Baltimore and with the Wadkins authority at Washington.) Protestants requested a finding that Vollmer had never conducted operations between Albany and New England points. The Examiner made such a finding. (Appellants requested a finding that Neale had never conducted operations between Baltimore and Washington. The Commission refused to make such a finding.) Nine shippers or receivers of freight appeared in support of the application, all of whom desired a single-line service by Boyce between New York points west of Albany, on the one hand, and New England points, on the other. (Five shippers testified in support of the Quinn application, all of whom desired single-line service by Quinn from Massachusetts points, on the one hand, and on the

Appellants respectfully submit that the questions presented by this appeal are of vital importance to them, to the motor carrier industry, generally, and to all persons and industries who must, of necessity, apply to the District Court for the District of Maryland for judicial review of the actions of administrative agencies. Appellants respectfully submit that the District Court has applied an incorrect standard of judicial review and has improperly construed the decision of this Court in the *Universal Camera* case,

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other, Washington, D. C., and Virginia points.) The Examiner found, "Vollmer's past operations have been substantial and as operated by it represents valuable properties with considerable good-will and going concern value." However, no operations have been conducted between Albany and New England points. (The Examiner and Commission found "* * * that operations have at all times been actively and consistently conducted under Neale's certificate * * *." No operations were conducted by Neale between Baltimore and Washington but the Examiner and Commission failed to make this finding.) The Examiner found that the carriers operating between Albany and New England points, "are providing an adequate and efficient service." (The Examiner and Commission found, "There is no evidence of any dissatisfaction with or deficiency in the service of the opposing carriers (Appellants). They are capable of handling additional traffic.") The Examiner found, "Boyce is, therefore, required to meet the burden of showing that the purchase of operating rights under which no operations have been performed wholly between the points between which it would institute operations would be responsive to a public need." (No such finding was made in the instant proceeding.) The Examiner found, "* * * should the transaction be approved, a restriction should be imposed against any service by Boyce solely between Albany and the New England points." (No such finding was made in the instant proceeding.) The Examiner found, "Some, but not all, of the remaining protesting carriers would be injured by the new service Boyce proposes." (In the instant case, the Examiner and Commission found, "It is quite likely that Vendee (Quinn), an aggressive carrier, will divert some freight from competitors.") The Examiner concluded: "Yet they have shown that the total service available and being rendered by them adequately meets all reasonable public need in the territory. Boyce has, therefore, failed to sustain the burden imposed and the Commission should find that the application should be denied." (In the instant case, the Examiner and Commission concluded that the transaction should be approved.)

supra, and review of this decision is, therefore, imperative. For the reasons shown the joint motion of the United States and the Interstate Commerce Commission to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief was served upon counsel for the parties by mailing a true copy of said brief to such counsel this 19th day of October, 1953.

JAMES J. DOHERTY.